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Magna Prima Bhd & Ors v Top Green Entity Sdn Bhd & Ors

B

HIGH COURT (KUALA LUMPUR) — SUIT NO D22–2039 OF 2000
HASNAH MOHAMMED HASHIM JC
2 APRIL 2012

C

Banking — Banker and customer — Duty of care — Breach of duty — Failure of bank to adhere to customer service policy ('CSP') in processing opening of current account — Failure to check/verify details of prospective customer — Account opened without introducer and resolution — Failure to ensure minimum deposit — Failure to alert customer regarding change in authorised signatories — Failure to counter-check new mandate — Failure to alert customer regarding suspicious transaction — Whether negligence of bank officer established

D

E

Tort — Conspiracy — Elements, of — Allegation of conspiracy to defraud by bank — Matters to be proven to establish conspiracy — Whether evidence adduced sufficient to constitute act of conspiracy — Whether matters complained of amounted to mere negligence

F

Tort — Negligence — Duty of care — Breach — Banker and customer — Banker and customer — Failure to check/verify details of prospective customer — Account opened without introducer and resolution — Failure to ensure minimum deposit — Failure to alert customer regarding change in authorised signatories — Failure to counter-check new mandate — Failure to alert customer regarding suspicious transaction — Whether negligence of bank officer established

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The first plaintiff was a public listed company. One Yap Soon Huat owned a substantial block of shares ('the FHH block') in the first plaintiff which he proposed to sell to certain parties ('the purchasers'). The second and third defendants represented part of the said purchasers. The first plaintiff was to undertake a proposed corporate exercise which would result in sale proceeds amounting to RM22,100,000 to the plaintiffs. The acquisition of the said FHH block was subject to certain conditions, inter alia, that the second and third plaintiffs must each open a bank account ('the plaintiffs' accounts') at the BCBB Jalan Meru Branch, Klang ('the 11th defendant') for the purpose of receiving the RM22,100,000. The second and third plaintiffs opened the plaintiffs' accounts at the 11th defendant bank on 15 September 2000. Sometime in mid-September 2000, Different Response Sdn Bhd ('DR') and Different Pride Sdn Bhd ('DP') opened a current account with the 11th defendant. The 12th defendant was the head of customer services and attended

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to the opening of the accounts. On 28 September 2000, the first defendant opened a current account where the third defendant was made the sole signatory. Subsequently, the entire FHH block was successfully sold. The 11th defendant was given a new set of letter of instructions whereby the second and third defendant, who were neither the directors nor shareholders of DP and DR, varied the previous instruction as follows: (i) DP instructed the 11th defendant to transfer the RM12m to the second plaintiff's account; and (ii) DR instructed the 11th defendant to transfer RM4,584,300 and RM5,415,700 to the second plaintiff's account. On 14 October 2000 the second and third defendants changed the signatories of the plaintiffs' accounts. On 16 October 2000, the entire sale proceeds amounting to RM22.1m were paid into the plaintiffs' accounts. The third defendant became not only the sole signatory to the first defendant's account, but also to the second plaintiff's account and the third plaintiff's account. The third defendant then withdrew a sum of RM22.1m from the plaintiffs' account and paid to the first defendant's account without the plaintiffs' knowledge or authority within a space of one and half hours. The plaintiffs' claims against the 12th defendant were as follows: (i) that the 12th defendant breached his duty of care owed to the plaintiffs; (ii) that the 12th defendant assisted the third defendant in the breach of its fiduciary duties as a director of the second and third plaintiffs; and/or (iii) that the 12th defendant together with the other defendants were involved in the fraud and/or conspire to defraud the plaintiffs with the sole purpose of removing by illegal means the sum of RM 22.1m. The issues which arose for the court's determination were whether the 12th defendant was liable to the plaintiffs for: (i) negligence in performing his duties as the 11th defendant's bank officer to the plaintiffs' detriment; (ii) dishonestly assisting the third defendant in the breach of the third defendant's fiduciary duties owed to the second and third plaintiffs; (iii) fraud; and (iv) conspiring with the first, second, third, fourth, fifth, ninth and 15th defendants to defraud the plaintiffs.

Held, allowing the claim with costs:

(1) The customer service policy ('CSP') issued by the 11th defendant must be adhered to by all bank officers and serves as a guideline to all bank officers as to the documents required when processing the opening of a current account. According to the CSP, a current account may only be opened with the authorisation of the head of customer service or the branch manager. The officer attending to the customer must ensure that the requirements listed in the CSP are duly complied with. It was clearly stated under cl 4.2.5 of the CSP that there must be an introducer and that the branch must check/verify the details of the prospective customer (see paras 34–36).

(2) The current account was opened without any introducer. The 12th defendant agreed that he had breached cll 4.2.4 and 4.2.5 of the CSP. As to the requirements of a minimum deposit of RM1,000 for DR and DP

to open the current accounts, the 12th defendant said in evidence that he had sighted the said documents showing that such amount was deposited. However, no documentary proof was tendered to support this. There were also no directors' resolutions from DR and DP as to the opening of the current account. Despite the aforesaid guidelines, there was no resolution, no introducer and no evidence that the minimum sum of RM1,000 was deposited and also no specimen signature cards for DR and first defendant but the 12th defendant proceeded to approve the opening of the aforesaid current accounts (see paras 37–40).

(3) The CSP was clearly not adhered to by the 12th defendant and by failing to do so, he had acted negligently as a bank officer. It is stated in the CSP that irrespective of whether an introducer is required or not, branches must exercise great care when opening new accounts. It was clear that the processing, approval and opening of the current accounts was hastily done and this fact was not denied by the 12th defendant (see paras 41–42).

(4) The 12th defendant did not call the second and third plaintiffs to alert that the second and third defendants had presented pre-dated resolutions to the bank. The 12th defendant knew that when the second and third plaintiffs opened current accounts with the 11th defendant, both companies had expressly required two signatories for the operation of the accounts. There were no documents given to the 12th defendant that the second and third defendants were taking over the second and third plaintiffs. When he became aware of the change in the companies' authorised signatories, he did not take any steps to alert the plaintiffs (see paras 41–42).

(5) The 12th defendant did not counter-check with the plaintiffs when he received the new set of instructions. He was not suspicious that such a large amount of money was being transferred. As a bank officer, he must act prudently and exercise great skill and care. The 12th defendant was negligent in handling and approving the transactions which ultimately resulted in the sum of RM22.1m being credited into the accounts within a couple of hours without any proper formal documentation (see paras 45 & 47).

(6) For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish: (i) an agreement between two or more persons; (ii) for the purpose of injuring the plaintiffs; and (iii) the execution of that agreement resulted in damages to the plaintiffs. The evidence adduced was insufficient to constitute an act of conspiracy. This was simply a case of a senior bank officer who was clearly negligent in discharging his duties (see paras 48–49).

[Bahasa Malaysia summary

Plaintif pertama adalah sebuah syarikat senaraian awam. Yap Soon Huat memiliki sebahagian besar blok saham ('blok FHH') dalam plaintif pertama yang mana dia bercadang untuk menjualnya kepada pihak-pihak tertentu ('pembeli-pembeli'). Defendan kedua dan ketiga mewakili sebahagian daripada pembeli-pembeli. Plaintif pertama mengakujanji untuk menjalankan tindakan korporat yang dicadangkan yang mana akan menghasilkan jumlah jualan sebanyak RM22,100,000 kepada plaintif-plaintif. Pengambilalihan blok FHH tertakluk kepada syarat-syarat tertentu, antara lain, bahawa plaintif kedua dan ketiga masing-masing dikehendaki membuka akaun bank (akaun plaintif -plaintif') di Cawangan BCBB Jalan Meru, Klang ('defendan ke-11') untuk menerima RM22,100,000. Plaintif kedua dan ketiga membuka akaun plaintif-plaintif di bank defendan ke-11 pada 15 September 2000. Kira-kira pada pertengahan bulan September 2000, Different Response Sdn Bhd ('DR') dan Different Pride Sdn Bhd ('DP') telah membuka akaun semasa dengan defendan ke-11. Defendan ke-12 merupakan ketua perkhidmatan pelanggan dan telah membantu dalam pembukaan akaun. Pada 28 September 2000, defendan pertama telah membuka akaun semasa di mana defendan ketiga telah dilantik sebagai penandatangan tunggal. Seterusnya, keseluruhan blok FHH telah berjaya dijual. Defendan ke-11 telah diberikan satu set surat arahan di mana defendan kedua dan ketiga, yang bukan pengarah serta pemegang saham DP dan DR, mengubah arahan sebelum ini, seperti berikut: (i) DP mengarahkan defendan ke-11 untuk memindahkan RM12 juta ke dalam akaun plaintif kedua; dan (ii) DR mengarahkan defendan ke-11 untuk memindahkan RM4,584,300 dan RM5,415,700 ke dalam akaun plaintif kedua. Pada 14 Oktober 2000 defendan kedua dan ketiga mengubah penandatangan-penandatangan akaun plaintif-plaintif. Pada 16 Oktober 2000, keseluruhan hasil jualan berjumlah RM22.1 juta telah dimasukkan ke dalam akaun plaintif-plaintif. Defendan ketiga bukan sahaja telah menjadi penandatangan tunggal akaun defendan pertama, tetapi juga untuk akaun plaintif kedua dan ketiga. Defendan ketiga kemudiannya menarik balik sejumlah RM22.1 juta daripada akaun plaintif-plaintif dan memasukkannya ke dalam akaun defendan pertama tanpa pengetahuan atau kebenaran plaintif-plaintif dalam masa satu setengah jam. Tuntutan plaintif-plaintif terhadap defendan ke-12 adalah seperti berikut: (i) bahawa defendan ke-12 telah melanggar tanggungjawab berhati-hati kepada plaintif-plaintif; (ii) bahawa defendan ke-12 telah membantu defendan ketiga dalam pelanggaran kewajipan fidusiarinya sebagai pengarah plaintif kedua dan ketiga; dan/atau (iii) bahawa defendan ke-12 bersama-sama dengan defendan-defendan lain telah terlibat dalam penipuan dan/atau berpakat untuk menipu plaintif-plaintif dengan tujuan melupuskan wang haram berjumlah RM22.1 juta. Isu-isu yang timbul untuk diputuskan oleh mahkamah adalah sama ada defendan ke-12 bertanggungjawab atas plaintif-plaintif bagi: (i) kecuaian dalam menjalankan tugasnya sebagai pegawai bank defendan ke-11 hingga

merugikan plaintif-plaintif; (ii) tidak berlaku jujur dengan membantu defendan ketiga dalam pelanggaran kewajipan fidusiari defendan ketiga ke atas plaintif kedua dan ketiga; (iii) penipuan; dan (iv) bersubahat dengan defendan pertama, kedua, ketiga, keempat, kelima, kesembilan dan ke-15 untuk menipu plaintif-plaintif.

Diputuskan, membenarkan tuntutan dengan kos:

(1) Polisi perkhidmatan pelanggan ('CSP') yang dikeluarkan oleh defendan ke-11 mesti dipatuhi oleh kesemua pegawai bank dan berfungsi sebagai panduan kepada kesemua pegawai bank untuk dokumen-dokumen yang diperlukan apabila memproses pembukaan akaun semasa. Menurut CSP, akaun semasa hanya boleh dibuka dengan kebenaran ketua perkhidmatan pelanggan atau pengurus cawangan. Pegawai yang melayan pelanggan perlu memastikan bahawa syarat-syarat yang disenaraikan dalam CSP dipatuhi dengan sewajarnya. Ia telah dinyatakan dengan jelas di bawah klausa 4.2.5 CSP bahawa mestilah terdapat seorang pencadang dan cawangan mestilah mendaftarkan/mengesahkan butir-butir bakal pelanggan (lihat perenggan 34–36).

(2) Akaun semasa telah dibuka tanpa sebarang pencadang. Defendan ke-12 telah bersetuju bahawa dia telah melanggar klausa 4.2.4 dan 4.2.5 CSP. Berkenaan keperluan deposit minimum RM1,000 untuk DR dan DP membuka akaun semasa, defendan ke-12 dalam keterangannya menghujahkan bahawa dia telah melihat bahawa dokumen tersebut menunjukkan bahawa amaun tersebut telah didepositkan. Walau bagaimanapun, tiada bukti dokumentari dikemukakan untuk menyokong keterangan ini. Resolusi pengarah dari DR dan DP juga tiada bagi pembukaan akaun semasa. Walaupun terdapat garis panduan, tiada resolusi, pencadang dan tiada keterangan bahawa jumlah minimum RM1,000 telah didepositkan dan kad-kad spesimen tandatangan untuk DR dan defendan pertama juga tiada tetapi defendan ke-12 meneruskan dengan meluluskan pembukaan akaun semasa tersebut (lihat perenggan 37–40).

(3) CSP jelas tidak dipatuhi oleh defendan ke-12 dan dengan kegagalan berbuat demikian, dia telah bertindak cuai sebagai pegawai bank. Telah dinyatakan dalam CSP bahawa tanpa mengira sama ada pencadang diperlukan atau tidak, cawangan perlu menjalankan langkah berhati-hati apabila membuka akaun baru. Adalah jelas bahawa pemprosesan, kelulusan dan pembukaan akaun semasa telah dibuat secara tergesa-gesa dan fakta ini tidak dinafikan oleh defendan ke-12 (lihat perenggan 41–42).

(4) Defendan ke-12 tidak memanggil plaintif kedua dan ketiga untuk memberitahu mereka bahawa defendan kedua dan ketiga telah membentangkan resolusi bank yang sudah bertarikh. Defendan ke-12

sedia maklum bahawa apabila plaintif kedua dan ketiga membuka akaun semasa dengan defendan ke-11, kedua-dua syarikat dengan nyata memerlukan dua penandatangan bagi tujuan operasi akaun tersebut. Tiada dokumen yang diberikan kepada defendan ke-12 menunjukkan bahawa defendan kedua dan ketiga telah mengambil alih plaintif kedua dan ketiga. Apabila dia menyedari perubahan dalam penandatangan-penandatangan syarikat yang diberikan kuasa, dia tidak mengambil sebarang inisiatif untuk memaklumkan plaintif-plaintif (lihat perenggan 41–42).

(5) Defendan ke-12 tidak memeriksa balas plaintif-plaintif apabila dia menerima set arahan yang baru. Dia tidak curiga bahawa sejumlah besar wang telah dipindahkan. Sebagai pegawai bank, dia mesti bertindak secara berhemat dan menjalankan kemahiran dan penjagaan yang tinggi. Defendan ke-12 cuai dalam mengendalikan dan meluluskan urus niaga yang akhirnya menyebabkan jumlah RM22.1 juta dikreditkan ke dalam akaun dalam beberapa jam tanpa sebarang dokumentasi rasmi yang sepatutnya (lihat perenggan 45 & 47).

(6) Untuk membuktikan berlakunya konspirasi, mestilah terdapat objek yang menyalahi undang-undang, atau, jika tidak dengan sendirinya menyalahi undang-undang, ia mesti dijalankan dengan cara yang menyalahi undang-undang. Untuk berjaya dalam tuntutan berdasarkan tort konspirasi, plaintif-plaintif mesti membuktikan: (i) suatu perjanjian antara dua orang atau lebih; (ii) bagi tujuan memudaratkan plaintif-plaintif; dan (iii) pelaksanaan perjanjian tersebut menyebabkan kerugian kepada plaintif-plaintif. Keterangan yang dikemukakan tidak mencukupi untuk membentuk suatu tindakan konspirasi. Ini cuma suatu kes pegawai bank kanan yang jelas cuai dalam menunaikan kewajipannya (lihat perenggan 48–49).]

Notes

For cases on duty of care, see 1(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2288–2301.

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1157–1226.

For cases on elements of conspiracy, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 83–87.

Cases referred to

Indian Overseas Bank v Industrial Chain Concern 1989 SCR Supl (2) 27; 1990 SCC (1) 484, SC (refd)

Legislation referred to

Companies Act 1965

Securities Industry (Reporting of Substantial Shareholding) Regulations 1998

Karen Lee (Raja Syarafina with her) (Wong Kian Kheong) for the plaintiff/respondent.
Gurmit Singh (Mak Lin Kum and Janice Wong with him) (Kadir, Andri & partners) for the defendant/appellant.

Hasnah Mohammed Hashim JC:

BACKGROUND OF THE PLAINTIFF'S CASE

[1] The first plaintiff is a public company incorporated in Malaysia whose shares were listed and quoted on the board of Bursa Malaysia (formerly known as the Kuala Lumpur Stock Exchange ('KLSE'). At the material time, the paid up share capital of the first plaintiff was RM33,300,000 comprising of 33,300,000 shares of RM1 each.

[2] Sometime in the year 2000, the plaintiffs proposed to carry out a corporate exercise by selling some of its assets in the form of plants, machinery and quarry rights ('said assets') belonging to the second and third plaintiffs to third parties for an aggregate amount of RM22,100,000 ('said proposed corporate exercise').

[3] At the material time, a director of the first plaintiff named Yap Soon Huat ('YSH') was also a substantial shareholder in the first plaintiff with approximately 8,883,924 shares in the first plaintiff (making up approximately 26.68% of the paid up share capital of the first plaintiff). YSH was also a common director of the second and third plaintiffs before tendering his resignation on 16 October 2000. The said shares were held through a private company named Fook Hua Holdings Sdn Bhd ('FHH').

[4] Towards the end of August 2000, the fifth defendant and one Patricia Chung (known as 'introducer') requested one Ahmad Ghazali bin Md Kassim, a director of the first plaintiff ('AGK') to arrange for a meeting between YSH and the fifth defendant. The following were the representations and statement of facts made by the fifth defendant to YSH:

(a) the fifth defendant is a remisier working at SJ Securities Sdn Bhd (a member of the KLSE);

(b) the fifth defendant has the authority to act for certain parties to purchase shares in the first plaintiff ('said purchasers'). The identities of the said purchasers were not disclosed by the fifth defendant to YSH at that time;

(c) the fifth defendant was made aware in general by AGK about the said proposed corporate exercise;

(d) the fifth defendant and a few other parties are the financiers to the said purchasers;

(e) the said purchasers are desirous of purchasing shares in the first plaintiff held by FHH in the amount of 6,600,000 shares representing approximately 19.8% of the total paid up share capital of the first plaintiff ('said FHH block');

(f) the fifth defendant informed the plaintiffs that the said purchasers were also at the same time negotiating with other substantial shareholders of the first plaintiff for the purchase of their shares, with the intention of taking over control of the first plaintiff; and

(g) if the acquisition of the said FHH block was successfully completed by the said purchasers, then according to the fifth defendant, the said purchasers were very likely to acquire the shares from the other substantial shareholders in the first plaintiff.

[5] After the said meeting at the end of August 2000, the fifth defendant introduced the second and third defendants to the plaintiffs as representing part of the said purchasers. The first defendant was the corporate vehicle for the said purchasers to acquire the said FHH block. The second and third defendants admitted to YSH that they are part of the said purchasers. However, the identities of the other purchasers were not disclosed by the first, second, third and fifth defendants to YSH or the plaintiffs.

[6] During the negotiation, the fifth defendant stated that the following conditions must be accepted by FHH and the plaintiffs before the said purchasers will carry out the acquisition of the said FHH block or the other blocks of shares from the other substantial shareholders of the first plaintiff:

(a) that the said purchasers must be given the freedom to determine the time and date for the acquisition of the said FHH block. The fifth defendant assured that such time and date would not be extended;

(b) FHH cannot use its own stock broking firm, but must use the eighth defendant, Amsteel Securities (M) Sdn Bhd ('AMSTEEL') who was introduced by the fifth defendant to FHH to act for FHH for the purpose of the sale of the said FHH block;

(c) as the said proposed corporate exercise will result in sale proceeds amounting to RM22,100,000 to the plaintiffs and the said purchasers will become new substantial shareholders in the plaintiffs, the acquisition of the said FHH block must be subject to the following conditions in order to protect the purchasers' interests:

(i) two members of the said purchasers or their nominees must be appointed as directors to the board of the first plaintiff;

(ii) a majority of the directors in the second and third plaintiffs must resign and be replaced by the said purchasers or their nominees;

(iii) the second and third plaintiffs must each open a bank account at the BCBB Jalan Meru Branch, Klang ('collectively known as the said plaintiffs' accounts') for the purpose of receiving the sales proceeds of the said assets amounting to RM22,100,000 as stated in para 12 above; and

(iv) the authorised signatories for conducing the said plaintiffs' accounts must consist of the said purchasers or their nominees or persons designated by the said purchasers.

[7] As an inducement to persuade FHH to agree to the second and fifth defendants' proposal and to show that the first to third defendants were genuine and bona fide purchasers and that the fifth defendant has financial interest in the proposal to acquire the said FHH block, the fifth defendant issued a letter of undertaking dated 25 September 2000 to FHH that the fifth defendant will purchase from FHH all remaining shares under the said FHH block which could not be sold by AMSTEEL, the eighth defendant at the price of RM4.50.

[8] The second defendant issued a letter of assurance dated 19 September 2000 to YSH stating that the second defendant will ensure that at the successful completion of the sale of the said FHH block, YSH's personal guarantee for the second and third plaintiffs will be discharged.

[9] As a result of the negotiations above, the second and third plaintiffs opened the said plaintiffs' accounts at the BCBB Jalan Meru Branch, sometime on 15 September 2000, where the signatories of the said plaintiffs' accounts held in the 11th defendant comprised Group A and Group B, as follows:

(a) name of account holder — the second plaintiff (Magna Prima Construction Sdn Bhd);

Group A (Signatories)	**Group B (Signatories)**
the second defendant (Lim Kee Peng)	Ng Yak Hee
the third defendant (Chiang Yee Hong)	Chua Lee Boon

(b) name of account holder — the third plaintiff;

Group A (Signatories)	**Group B (Signatories)**
the second defendant (Lim Kee Peng)	Ng Yak Hee
the third defendant (Chiang Yee Hong)	Chua Lee Boon

[10] Sometime in mid-September 2000, Different Response Sdn Bhd

('DR') and Different Pride Sdn Bhd ('DP') opened a current account with the 11th defendant at the BCBB Jalan Meru Branch. The 12th defendant was at that time head of customer services and attended to the opening of the said plaintiffs' accounts at the BCBB (the 11th defendant) Jalan Meru Branch. The details of the said accounts are as follows:

(a) name of account holder — DR; and

(b) name of account holder — DP.

[11] By way of two letters of written instructions dated 14 September 2000, DP instructed the 11th defendant to transfer the sums of RM6,315,468,000 and RM12,100,000 from DP's account into the second plaintiff's account upon receipt of the same.

[12] In another letter of written instruction dated 14 September 2000, DR also instructed the 11th defendant to transfer the sums of RM3,684,532 from DR's account into the third plaintiff's account.

[13] The 12th defendant accepted the said letters of written instructions dated 14 September 2000 from DP and DR.

[14] On 28 September 2000, the first defendant opened a current account where the third defendant was made the sole signatory to the said first defendant's account. The details of the said first defendant's account are as follows:

(a) name of account holder — the first defendant (Top Green Entity Sdn Bhd); and

(b) signatory — the third defendant (Chiang Yee Hong).

[15] Subsequently, the entire FHH block was successfully sold by the eight defendant on behalf of FHH on 11 October 2000 on the KLSE market. Following the sale of the said FHH block, FHH and its substantial shareholders filed the relevant notices (under the provisions of the Companies Act 1965 and under the provisions of the Securities Industry (Reporting of Substantial Shareholding) Regulations 1998) relating to the reduction in substantial shareholding in the first plaintiff, the KLSE and the Securities Commission.

[16] The eight defendant then informed FHH that the sale of the FHH block can only be completed and released to FHH on 16 October 2000.

[17] The 11th defendant was given a new set of letter of instructions whereby the second and third defendant, who were neither the directors nor

shareholders of DP and DR, varied the previous instruction as follows:

(a) DP instructed the 11th defendant to transfer the RM12m to the second plaintiff's account; and

(b) DR instructed the 11th defendant to transfer RM4,584,300 and RM5,415,700 to the second plaintiff's account.

[18] On 14 October 2000 the second and third defendants changed the signatories of the said plaintiffs' accounts. On 16 October 2000, the entire sale proceeds amounting to RM22.1m were paid into the plaintiffs' accounts. The third defendant became not only the sole signatory to the first defendant's account, but also to the second plaintiff's account and the third plaintiff's account. The third defendant then withdrew a sum of RM16,684,000 from the plaintiff's account and paid to the first defendant's account. A sum of RM5,415,700 from the third plaintiff's accounts were paid to the first defendant's account.

[19] As a result of the aforesaid transactions, RM22.1m was withdrawn from the plaintiffs' accounts without their knowledge or authority within a space of one and the half hours.

CLAIM AGAINST THE 12TH DEFENDANT

[20] At the material time, the 12th defendant was the assistant manager of the 11th defendant at the BCBB Jalan Meru Branch. By virtue of his position, the 12th defendant had the authority to approve various transactions at the bank, including the opening of the said plaintiffs' current accounts, the first defendant's account and all other related transactions.

[21] It is contended by the plaintiff that the 12th defendant knew the second, third, fifth and/or tenth defendants. The 12th defendant was informed by the second, fifth and tenth defendants that as part of the takeover of the plaintiffs, the plaintiffs would be disposing various assets worth RM22.1m and that the sale price of RM22.1m would be deposited into the said plaintiffs' accounts, which will be opened at the BCBB Jalan Meru Branch.

[22] The 12th defendant had assisted in the opening of the first defendant's account, the said plaintiffs' accounts, the DR's and the DP's account at the BCBB Jalan Meru Branch for the sole purpose of having the sale proceeds of the said assets be deposited into the said plaintiffs' account. The 12th defendant received the second and third plaintiffs' board of directors' resolutions dated 15 September 2000 and knew that joint-signatories were required to withdraw monies from the said plaintiffs' account. He personally

received DR's and DP's letters of written instructions to transfer the aggregate of RM22.1m into the said plaintiffs' account.

[23] On 14 October 2000, the second defendant and third defendant met the 12th defendant with the view of effecting the second plaintiff's and third plaintiff's board resolutions which was dated 16 October 2000. On 16 October 2000, the 12th defendant met the third, fifth and tenth defendants and on the same morning, RM12.1m was deposited by the eighth defendant into DP's account which was subsequently paid into the said plaintiffs' account. The 12th defendant assisted the third, fifth, and tenth defendants in transferring RM12.1m from the said second plaintiff's account into the first defendant's account. Immediately thereafter, the 12th defendant assisted the third, fifth and tenth defendants to transfer RM11.1m from the first defendant's account into the eighth defendant's account.

[24] A few minutes after that, the third, fifth and tenth defendants transferred RM9.9m from the eighth defendant's account into DR's account which was subsequently transmitted into the said plaintiffs' account. Immediately thereafter, the 12th defendant then assisted the third, fifth and tenth defendants to transfer RM9.9m from the said plaintiffs' accounts into the said first defendant's account. The 12th defendant assisted the third, fifth and tenth defendants in transmitting from the first defendant's account the sum of RM9.9m into the eighth defendant's account and paid the sum of RM1.1m to the nineth defendant.

[25] Since filing of the suit, the plaintiffs had:

(a) obtained judgment in default against the first and third defendant;

(b) withdrawn the suit with no order as to costs (in chronological order) against:

  (i) the second defendant who had been adjudicated a bankrupt;

  (ii) Mr Ser Cheng Choy and Schwab & Co Sdn Bhd (both unrepresented by solicitors);

  (iii) the eighth, nineth and tenth defendant on 29 June 2009;

  (iv) Mdm Chok Chew Lan and Tsunami Capital Sdn Bhd with costs to be determined by the court, on 29 June 2009;

  (v) the seventh defendant on 20 January 2010; and

  (vi) the 11th defendant on 5 February 2010;

(c) filed notice of discontinuance against the fourth defendant on 16 June 2009 following a consent judgment dated 2 March 2009 ('consent

judgment') in respect of the first plaintiff's shares held as security by Affin Investment Bank Bhd and Alliance Investment Bank Bhd. Nominees (Tempatan) Sdn Bhd; and

(d) recovered a total of 1,222,000 shares of the first plaintiff, out of which 953,000 shares were recovered from the fourth defendant as per the consent judgment.

[26] During trial before this court on 24–25 October 2011, the plaintiffs decided to only proceed against the fifth defendant and the 12th defendant.

[27] This is an appeal by the 12th defendant and this grounds of judgment only deals with the issues relating to the said 12th defendant.

THE CLAIM

[28] The plaintiffs' claims against the 12th defendant are as follows:

(a) that the 12th defendant breached his duty of care owed to the plaintiffs;

(b) that the 12th defendant assisted the third defendant in the breach of its fiduciary duties as a director of the second and third plaintiffs; and/or

(c) that the 12th defendant together with the other defendant were involved in the fraud and/or conspire to defraud the plaintiffs with the sole purpose of removing by illegal means the sum of RM22.1m.

ISSUES TO BE DETERMINED BY THE COURT

[29] The following issues are to be determined by the court:

Whether the 12th defendant is liable to the plaintiffs for:

(a) negligence in performing his duties as the 11th defendant's bank officer to the plaintiffs' detriment;

(b) dishonestly assisting the third defendant in the breach of the third defendant's fiduciary duties owed to the second and third plaintiffs;

(c) fraud; and

(d) conspiring with the first, second, third, fourth, fifth, ninth and 15th defendants to defraud the plaintiffs based on circumstantial evidence.

FINDINGS

Whether the 12th defendant is liable to the plaintiffs for:

(i) negligence in performing his duties as the 11th defendant's bank officer to the plaintiffs' detriment;

(ii) dishonestly assisting the third defendant in the breach of the third defendant's fiduciary duties owed to the second and third plaintiffs;

(iii) and fraud.

[30] The 12th defendant was the head of customer services at the 11th defendant Jalan Meru Branch with about 27 years in service. He was responsible for the overall operation of the Meru Branch.

[31] The plaintiffs contend that they were defrauded of the sales proceeds and that the fraud was perpetrated by the fifth defendant together with the other defendants including the 12th defendant. The plaintiffs further contend that the 12th defendant was negligent in handling and approving the transactions relating to the sales proceeds.

[32] Learned counsel for the 12th defendant submitted that there is no duty of care between the bank's employees personally and the bank's customer. Furthermore there is no standard of care that the 12th defendant ought to have adhere to. It is the submission of the 12th defendant's counsel that the 12th defendant was merely doing his job as a bank officer based on the instructions given to him and the resolution which authorised the third defendant as the sole signatory of the cheques.

[33] Learned counsel for the plaintiffs submitted that as the head of customer service, the 12th defendant would have been very familiar with the procedures as set out under Customer Service Policy ('CSP') issued by the bank. Based on the evidence, there were many breaches of the CSP by the 12th defendant. During cross-examination, it was put to the 12th defendant that para 6 of the CSP has been breached as there were no directors' resolutions from DP and DR in respect of the opening of the account with the 11th defendant. The 12th defendant gave evidence that he had sighted the said resolutions. However the resolutions were never tendered as evidence by the 12th defendant.

[34] The CSP of the 11th defendant must be adhered to by all bank officers

and serves as a guideline to all bank officers as to the documents required when processing the opening of a current account. This is admitted in evidence by the 12th defendant during cross-examination,

Q: Re: pg 1-41 Bundle C.

Customer Service Policy dated 20.5.2000.

Do you agree with me pg 1-41 C is the bank's policy in respect of current account?

A: Yes.

Q: If any officer, employee does not comply with the CSP the bank can take disciplinary action?

A: Yes.

[35] According to the CSP, a current account may only be opened with the authorisation of the head of customer service or the branch manager. The officer attending to the customer must ensure that the requirements listed in the CSP are duly complied with,

4.2.4 Authorisation to Open Current Account

A current account may only be opened with the authorization of the head of Customer Service or the Branch Manager. The CSO attending to a prospective customer must ensure that the requirements listed under items 4.2.5 to 4.2.9 hereunder are duly complied with during the process of opening of account.

[36] It is clearly stated under 4.2.5 of the CSP that there must be an introducer and that the branch must check/verify the details of the prospective customer,

4.2.5 Need for Introducer

All prospective customer must be properly introduced to the bank. Where personal introduction not possible, a reference must be obtained …

[37] What happened in the instant case is that the current account was opened without any introducer. The 12th defendant was very uncertain and evasive when he was asked by the plaintiffs' counsel whether under the CSP there is an exception to the requirement of an introducer,

Q: Based on the CSP, is there any exception, no need introducer? Yes or No?

A: Yes

Q: Where is it? Show me?

A: Oh you refer to this one, sorry, no, no.

[38] When he was asked again whether there is an exception, his answer changed to a no. However, also agreed that he had breached cll 4.2.4 and 4.2.5 of the CSP. As to the requirements of a minimum deposit of RM1,000 for DR and DP to open the current accounts, the 12th defendant said in evidence that he had sighted the said documents showing that such amount was deposited. However, no documentary proof was tendered to support this.

[39] There were also no directors' resolutions from DR and DP as to the opening of the current account. Before a company can open a current account in the bank, the documents required are as follows:

> 6. Limited Companies
>
> Certified copy of:
>
> -Resolution from Board of Directors (signed/certified by Co. Sec) to open account & list of authorized signatories
>
> -Form 24-Return of allotment of shares
>
> -Form 49-Particulars of Directors
>
> -Memorandum & Articles of association
>
> -Certificate of Incorporation
>
> -Certificate of Authority ….

[40] Despite the aforesaid guidelines, there was no resolution, no introducer and no evidence that the minimum sum of RM1,000 was deposited and also no specimen signature cards for DR and first defendant but the 12th defendant proceeded to approve the opening of the aforesaid current accounts.

[41] The CSP was clearly not adhered to by the 12th defendant and by failing to do so, he had acted negligently as a bank officer. It is stated in the CSP that irrespective of whether an introducer is required or not, branches must exercise great care when opening new accounts. From the evidence, it is clear that the processing, approval and opening of the current accounts hastily done and this fact was not denied by the 12th defendant.

[42] The 12th defendant did not call the second and third plaintiffs to alert that the second and third defendants had presented pre-dated resolutions to the bank. The 12th defendant knew that when the second and third plaintiffs opened current accounts with the 11th defendant, both companies had expressly required two signatories for the operation of the accounts. There were no documents given to the 12th defendant that the second and third defendants were taking over the second and third plaintiff. When he became aware of the change in the companies' authorised signatories (P49A and D50), he did not take any steps to alert the plaintiffs.

[43] The 12th defendant had admitted in evidence that there was no instruction from either DR, DP, the second and third plaintiffs or the first defendant that the transactions involving substantial sums carried out on 16 October 2000 must be completed within 1 1/2 hour.

[44] KN Saikia J in *Indian Overseas Bank v Industrial Chain Concern* 1989 SCR Supl (2) 27; 1990 SCC (1) 484 referred to *Practice and Law of Banking* by HP Sheldon (11th Ed), in chapter 5 at p 64 on the standard of care to be taken by a bank in opening an account:

> Before opening an account for a customer who is not already known to him, a banker should make proper preliminary inquiries. In particular, he should obtain references from responsible persons with regard to the identity, integrity and reliability of the proposed customer.
>
> If a banker does not act prudently and in accordance with current banking practice when obtaining references concerning a proposed customer, he may later have cause for regret.

[45] The 12th defendant did not counter-check with the plaintiffs when he received the new set of instructions. He was also not suspicious that such a large amount of money was being transferred. As a bank officer, he must act prudently and exercise great skill and care.

[46] Justice KN Sakia also referred to ML Tannan in *Banking Law and Practice in India*, (18th Ed), at p 198 where it says:

> Before opening a new account, a banker should take certain precautions and must ascertain by inquiring from the person wishing to open the account, if such person is unknown to the banker, as to his profession or trade as well as the nature of the account he proposes to open. By making necessary inquiries from the references furnished by the new customer, the banker can easily verify such information and judge whether or not the person wishing to open an account is a desirable customer. It is necessary for a bank to inquire, from responsible parties, given as references by the customer, as to the tatter's integrity and respectability, an omission of which may result in serious consequences not only for the banker concerned, but also for other bankers and the general public.
>
> One of the tests of deciding whether the bank was negligent, though not always conclusive, is to see whether the Rules or instructions of the banks were followed or not. We may accordingly consult those instructions. Ex. B-6 contains the general instructions regarding constituent accounts for bank. Mark II deals with opening of accounts. It says:
>
> > Except at large branches where the subagent or accountant may be authorised to open Current Accounts, no new Current Account shall be opened without the authority of the agent manager who is solely responsible for all Current Accounts being opened in the proper manner. A written application on the appropriate

form must be submitted and will be initialed by the agent at the top left corner after he has satisfied himself of the respectability of the applicant(s). It is important that every party must be introduced to the Bank by a respectable person known to the Bank, who must normally call at the Bank and sign in the column specially provided for the purpose in the account opening form. In all cases his signature must be verified with the specimen lodged and attested. The agent or accountant may introduce constituents to the Bank provided they are known to him personally and in such cases he should sign the application form at the appropriate place in his personal capacity. When the introduction of any other member of the staff is accepted, the agent must invariably make independent inquiry and record his findings on the account opening form for future reference if the need arises ….

[47] Therefore it is important that the bank officer, in this case, the 12th defendant, takes all necessary steps to check and verify before approving account. Based on the evidence adduced, I find that the 12th defendant was negligent in handling and approving the transactions which ultimately resulted in the sum of RM22.1m being credited into the accounts within a couple of hours without any proper formal documentation.

WHETHER THE 12TH DEFENDANT CONSPIRED WITH THE FIRST, SECOND, THIRD, FOURTH, FIFTH, NINTH AND 15TH DEFENDANTS TO DEFRAUD THE PLAINTIFFS BASED ON CIRCUMSTANTIAL EVIDENCE

[48] For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:

(a) an agreement between two or more persons;

(b) for the purpose of injuring the plaintiffs; and

(c) the execution of that agreement resulted in damages to the plaintiffs.

[49] The facts may have seem to give the impression that there was a conspiracy to defraud. However, the court must thoroughly sieved the facts to ensure that those facts satisfy the principles laid out above. This court finds that the evidence adduced is insufficient to constitute an act of conspiracy. This was simply a case of a senior bank officer who was clearly negligent in discharging his duties. There was no evidence to show predetermined collusion between the 12th defendants and the first, second, third, fourth, fifth, ninth and 15th defendants.

[50] As such there was no evidence to show that the 12th defendant was involved in the conspiracy to defraud the plaintiffs and further no evidence adduced to show that the 12th defendant knew the fifth defendant or that he was involved in any conspiracy together with the first, second, third, fourth, fifth, ninth and 15th defendants to defraud the plaintiffs.

CONCLUSION

[51] This court finds that the plaintiffs have proved on a balance of probabilities that the 12th defendant was negligent. It is ordered that the 12th defendant pay damages to the plaintiffs. Damages to be assessed with interest of 8% from 16 October 2000 until the date of judgment and 4% from this date until the date of realisation. Cost of RM15,000.

Claim allowed with costs.

Reported by Kanesh Sundrum